UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In the Matter of:

UNITED PARCEL SERVICE, Inc.

and **Case No. 06-CA-143062**

ROBERT C. ATKINSON, JR.

REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS (RESPONDING TO GENERAL COUNSEL'S ANSWERING BRIEF)

I. INTRODUCTION[1]

Respondent United Parcel Service, Inc. ("UPS" or "Company") hereby files this Reply Brief in Support of its Exceptions to the Decision and Order ("Decision") of Administrative Law Judge Geoffrey Carter ("ALJ") issued in the above-captioned case on November 25, 2016. *See* JD–112–16. This Reply Brief responds to the Answering Brief of the General Counsel ("GC").[2] Because the GC has failed to effectively rebut the compelling arguments set forth by UPS, the Company's Exceptions should be granted.

II. CLARIFICATION OF FACTS

The GC takes great liberties with the hearing record and the ALJ's Decision.[3] As a threshold matter, the GC repeatedly relies on testimony the ALJ expressly discredited as "unreliable," "equivocal," or "equally credible" as that of UPS witnesses. For example, the GC cites the discredited testimony of Mark Kerr ("Kerr"), who alleged On-Road Supervisor Matt DeCecco ("DeCecco") prohibited the distribution of any literature not "on Teamsters letterhead." (*Compare* GC Answer, p. 15 *with* ALJ pp. 11-12 at fn.15.) The GC also cites Kerr's testimony about Dispatch Supervisor Ray Alakson ("Alakson") allegedly bringing him a new DIAD when he failed to get EDD, despite the ALJ's finding that, because Kerr's account was "equally credible" to Alakson's denial, UPS is entitled to the benefit of the doubt. (*Compare* GC Answer, pp. 36-37, 46 *with* ALJ p. 37 at fn.44.) The GC further cites

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[1] Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. Transcript pages are parenthetically referenced as "Tr. ___." Pages from the Decision are cited parenthetically as "ALJ, p. ___." Pages from the General Counsel's Answering Brief are cited parenthetically as "GC Answer, p. ___," and pages from Respondent's Brief in Support of Exceptions are cited parenthetically as "R. Brief, p. ___."

[2] Section 102.46(j) of the Rules and Regulations of the National Labor Relations Board ("Board") prohibits the consolidation of reply briefs. UPS will therefore contemporaneously file a separate Reply Brief in response to the Charging Party's Answering Brief, although some of the arguments herein may be equally applicable to both the GC's position and the Charging Party's position.

[3] UPS cannot possibly address all the GC's misleading citations and assertions within the confines of this Reply Brief, but the Company feels compelled to at least call attention to some of the more egregious examples.

the testimony of Dan Morris ("Morris"), whom the ALJ found "unreliable" in his account of DeCecco's alleged conduct in response to the car signs. (*Compare* GC Answer, p. 15 at fn.34 *with* ALJ pp. 15-16 at fn.23.) The GC additionally claims Morris "testified" he was not disciplined when he "occasionally failed to download EDD," yet Morris's testimony includes no reference to "EDD" or "download" at all. (*Compare* GC Answer, p. 46 *with* Tr. 607-35.) The Board should disregard the unreliable, discredited, and nonexistent testimony on which the GC relies.

The GC suggests UPS deviates from its progressive discipline policy all the time, without rhyme or reason, claiming RX-15 reflects "several suspensions of one or five days, rather than the standard three and ten day progression." (GC Answer, p. 7 at fn.15.) Cited RX-15 reflects all discipline issued to New Kensington Center ("Center") employees from January 1, 2013, through June 10, 2016. (Tr. 951, RX-15.) From reviewing this exhibit, it is obvious that most one- and five-day suspensions involve an employee whose original suspension was reduced,[4] or an employee who (unlike Atkinson) was treated more severely than the standard warning/three-day/ten-day/discharge discipline progression.[5] (Tr. 875, 930, 935, 1439, 1519; RX-15.)

The GC repeatedly claims UPS did not produce evidence of other employees disciplined for failure to download EDD. (GC Answer, pp. 37, 46.) These assertions are patently false. UPS indeed introduced evidence of a driver, Eric Parker, who was disqualified (i.e., no longer permitted to drive) after management discovered he left on his route without downloading EDD. (Tr. 1546-47.) Beyond this incident, UPS managers unanimously and emphatically testified that they were not aware of any driver ever neglecting to download EDD. (Tr. 959-60, 1000, 1186-87, 1199, 1329, 1377, 1393-94, 1408-09, 1546-47, 1654, 1682.) It is axiomatic that an employer can only impose discipline for known violations of policy. It is likewise beyond dispute that an employer can take adverse employment action against an employee for a "violation of first impression"—one that has never been committed before and may never be committed again. *See, e.g., St. George Warehouse, Inc.*, 349 NLRB 870, 878-79 (2007) (citing *National Steel Supply*, 344 NLRB 973, 975 (2005) and explaining that "the absence

[4] For example, the following employees had ten-day suspensions reduced to five- or six-day suspensions: Emanuel Farrell (RX-15, pp. 1-2); Shawn Hetler (RX-15, p. 2); Mark Kerr (RX-15, p. 3); and Theresa McKown (RX-15, pp. 3-4). In addition, the following employees had three-day suspensions reduced to one-day suspensions: Emanuel Farrell (RX-15, p. 2); Robert Larimer (RX-15, p. 3); and Theresa McKown (RX-15, p. 3). In one case, Matt Ramer had a ten-day suspension reduced to a five-day suspension based on his agreement in advance to accept the discipline without challenge through the grievance procedure. (Tr. 1354-55; RX-15, p. 4.)

[5] The West Pennsylvania Area ("WPA") Supplement only allows discipline to remain active on an employee's record for nine months (Tr. 373), and the following employees were treated more harshly than normal in that they received discipline more severe than the standard warning, three-day, ten-day progression: Richard Johnston got a five-day suspension in place of a three-day suspension (RX-15, p. 2); and Mitchel Rodriguez got a three-day suspension instead of a warning (RX-15, p. 4).

of other discipline for over-weight containers does not show disparate treatment;" when an employee's conduct is "unprecedented," then "discipline is not necessarily unlawful solely because an employer has imposed it for the first time").

The GC argues that Atkinson's failure to get EDD "was not a remarkable event" because "it did not occur to [Alakson] to ask why Atkinson had failed to download EDD." (GC Answer, p. 35.) This representation is shamefully inaccurate. Alakson plainly testified that, when Larimer called, he stated only that Atkinson "needed another DIAD," and at DeCecco's prompting, Alakson asked "Why does [Atkinson] need another DIAD?" (Tr. 1187-88, 1373 (emphasis added).) This is an entirely different question than the nonexistent testimony cited by the GC, and it reflects only that taking a new DIAD to a driver—standing alone—is not remarkable, as some DIADs need replaced for legitimate reasons. (Tr. 1000, 1373, 1378-79, 1408, 1653.)

The GC likewise compares DeCecco's reluctance "to threaten an employee with 'impending' discipline while they still have their workday ahead of them" with the Company's past issuance of discipline to Atkinson at the start of his shift, arguing that DeCecco's actions on October 28th (upon delivering the new DIAD) were inconsistent with UPS practice. (GC Answer, p. 36.) It is easy to distinguish the situation DeCecco described (i.e., making drivers worry all day about potential, but yet-to-be finalized discipline that must still be investigated and approved) from the actions taken by UPS (i.e., communicating actual discipline decisions, that have been previously determined, to drivers at the outset of their shift). One situation obviously creates needless anxiety about the unknown, whereas the other merely conveys the finality of a decision already made.

III. ARGUMENT

A. The Regional Director's unrevoked deferral to the November 2014 Panel is binding on the GC, the ALJ, and the Board.

The GC spends an inordinate time emphasizing Atkinson's talk-withs,[6] warning,[7] suspensions,[8] OJS ride,[9] lock-in SPORH,[10] blended ride,[11] and discharges from January 2014 through June 2014,[12] insisting they

[6] Atkinson did not even bother to grieve his April 1st or May 22nd documented talk-withs, as they were commonplace, were not part of the contractual discipline process, and did not further his disciplinary progression. (Tr. 249-50, 431.) The General Counsel contends these talk-withs should be considered disciplinary in nature because "McCready used [them] in his presentation to the grievance panel hearing the grievance over Atkinson's October 28, 2014 discharge," and because "Washington, without any notice to Atkinson, submitted th[e] [shaving] conversation as a 'documented talk with' discipline." (GC Answer, pp. 16, 20.) However, the record reflects that documented talk-withs are just like Letters of Record, which the General Counsel concedes "are not considered discipline, but are used to communicate to the drivers the areas in which they need to improve." (GC Answer, p. 27.)

[7] The General Counsel asserts that "[o]ther employees testified they failed to remove Next Day Air packages from their trucks at the end of the day and [UPS] did not discipline them for those failures," citing the testimony of Mark Kerr ("Kerr"), Robert Larimer ("Larimer"), and Bill Lange ("Lange"). (GC Answer, pp. 13-

reflect an intent to target Atkinson.[13] (GC Answer, pp. 13-31, 43-45.) These arguments are addressed by the Company's Exceptions Brief and Answering Briefs, so UPS will not fully discuss them here. Suffice it to say

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14.) Kerr's testimony was impeached through his own Board Affidavits, and he eventually admitted that he "received warning letters about twice a year for forgetting Next Day Air packages." (Tr. 429-31.) Larimer had not forgotten Next Day Air ("NDA") packages since before 2014, and Lange had not forgotten NDA packages since before 2013. (Tr. 532-33, 586, 619.) The only credited evidence during the relevant time period reflects that—like Atkinson—several other drivers also received warning letters for missed NDA packages, although there is no evidence their packages were international and over 70 pounds). (ALJ, p. 10; Tr. 321-22, 877-78; RX-7.)

[8] Regarding Atkinson's three-day suspension, the General Counsel claims UPS "presented no documentary evidence to show when [the May 2014 DIAD] training was assigned." (GC Answer, p. 18 at fn.41.) However, the General Counsel admits that, "[i]f [DIAD] training is not completed, the driver gets a reminder notification . . . the following day," and further concedes that UPS gave "reminders to Atkinson . . . on May 15 and 16, 2014." (GC Answer, pp. 18, 19 at fn.41.) These collective admissions compel the conclusion that Atkinson's DIAD training became available at least as early as Wednesday, May 14, 2014—the very same date allegedly identified by DeCecco. (GC Answer, p. 19.) The General Counsel also attempts to attack Atkinson's three-day suspension by claiming UPS did not produce evidence of other employees disciplined for failure to complete DIAD training. (GC Answer, p. 19 at fn.44.) This assertion is patently false. UPS introduced evidence of another driver, Matt Ramer, who was originally issued a ten-day suspension after he said he could not complete his DIAD training because "he had too much work for the day." (Tr. 1354-55; RX-15, p. 4.) This ten-day suspension was reduced to a five-day suspension based on the driver's upfront agreement to accept the discipline without challenge through the grievance procedure. (Tr. 1354-55; RX-15, p. 4.)

[9] The General Counsel flatly ignores the ALJ's determination that, because Atkinson's testimony about the OJS ride was only "equally credible" to the testimony of Jeremy Bartlett ("Bartlett"), UPS is entitled to "the benefit of the doubt regarding . . . conflicting testimony [about the OJS ride] . . . because the General Counsel bears the burden of proving the allegations in the complaint." (*Compare* GC Answer, pp. 24-25, 28 *with* ALJ p. 22 at fn.32.) The General Counsel repeatedly cites Atkinson's discredited testimony, even going so far as to attribute a finding of fact to the ALJ, when the quoted testimony was expressly denied by Bartlett and thus was never credited (or even mentioned) by the ALJ. (GC Answer, p. 25 (citing ALJ p. 23); Tr. 1470-71.) The Board should give no weight to the discredited testimony on which General Counsel relies.

[10] The GC contends Atkinson "did not have to deliver to . . . rural areas" and "did not have to . . . deliver Next Day Airs" during the OJS ride. (GC Answer, pp. 25-26.) The record clearly reflects Alakson had no control over drivers' NDA volume, which is entirely dependent on customer needs and thus not a metric measured on OJS rides. (Tr. 1168-69, 1360, 1366.) In any event, Atkinson made several NDA deliveries during his OJS ride, including six on the first day. (Tr. 1360-63.) Moreover, Alakson only ever excluded one section that could potentially be part of Atkinson's route—and only on the first day of the OJS ride. (Tr. 1364-65, 1495-99.) For the OJS Blitz, Alakson used an average of the drivers' daily routes, including days when they did and did not have rural areas or make NDA deliveries. (Tr. 773.) Alakson therefore excluded sections from and/or added sections to each route depending on the stops needed for each driver's average planned day. (ALJ, p. 22; Tr. 1363.) When Atkinson complained about the "Bird" section allegedly missing from his route on the first day of the OJS ride, Bartlett directed Alakson to give Atkinson every possible pickup and delivery stop in every possible geographic area for his route the next two days. (ALJ, p. 24; Tr. 172-73, 1495-97.) Even after the rural "Bird" section was added to Atkinson's route, his SPORH for the next two days of his OJS ride barely declined at all. (RX-34.) In fact, if Atkinson had been credited with a lock-in SPORH of 13.53—the lowest daily SPORH he achieved during the three-day OJS ride—it would have been only .2 package per hour higher than his actual lock-in SPORH of 13.73. (RX-34.)

[11] For example, the General Counsel emphasizes that none of the other OJS drivers had a follow-up ride as quickly as Atkinson. (GC Answer, pp. 44-45.) However, none of the other drivers had avoidable accidents less than two weeks after the OJS ride either. The General Counsel further contends Lange was treated more favorably than Atkinson by never receiving a follow-up ride at all. The General Counsel argues that Lange should have received a follow-up ride because, "in the twenty-three weeks following the OJS rides, [Lange] matched his SPORH 'lock-in' score only three times." (GC Answer, p. 27 (citing GC-26).) The cited exhibit, GC-26, reflects Atkinson's green bars, which show nothing about Lange's post-OJS ride performance. The General Counsel presumably intended to cite GC-36, although that exhibit reflects Lange's performance for only 22 weeks, as he was on vacation for one week. (GC-36; RX-35 (reflecting vacation during Week 3).) This exhibit further reflects that, unlike Atkinson, Lange exceeded his lock-in SPORH in four different weeks, and his SPORH never dropped more than .75 package per hour. (GC-36; RX-35.) Like Atkinson, the other four OJS drivers received follow-up rides because their SPORHs dropped more than one package per hour. (RX-34; RX-36; RX-37; RX-38; RX-39.) Finally, the General Counsel touts the fact that one OJS driver, Richard Behning, was assigned to another route several weeks after the OJS ride and was thereafter not judged against a lock-in SPORH. (GC Answer, p. 28.) Atkinson was also reassigned to another route after the OJS ride, and he was relieved of his lock-in SPORH three weeks earlier than Behning. (RX-34.)

[12] The General Counsel misconstrues testimony from Lindsay Marshall ("Marshall"), insinuating "a driver 'typically' gets one warning letter" for both methods infractions and sustainability after an OJS follow-up ride, and "this is contrary to how [UPS] treated Atkinson." (GC Answer, p. 6 at fn.10.) A review of Marshall's testimony reveals that he referred to drivers typically receiving one discipline to cover all methods infractions observed on an OJS follow-up ride, rather than issuing a separate discipline for each different infraction, which is exactly what happened with Atkinson and four other OJS drivers. (Tr. 780-81; RX-15, p. R01653.) Marshall further distinguished methods infractions from performance sustainability (i.e., supervised-versus-unsupervised performance), clarifying that UPS issues one discipline for methods and a separate discipline for sustainability, which is also exactly what happened with Atkinson and four other OJS drivers. (Tr. 783-84, RX-15, pp. R01652-R01653.) The General Counsel suggests that three of the other OJS drivers who received separate, back-to-back discipline for methods violations and sustainability were nonetheless treated more favorably than Atkinson because "several weeks passed before these disciplines were issued." (GC Answer, p. 31.) The General Counsel's characterization implies there was a delay in disciplining these three OJS drivers, as though it was an afterthought. But the record evidence clearly reflects that—like Atkinson—these OJS drivers were also disciplined in the days immediately after their follow-up rides. (RX-34; RX-36; RX-37; RX-39.) In addition, the General Counsel conveniently omits any reference to Ron Schick, another OJS driver who repeatedly suffered discipline due to his post-OJS performance and who (like Atkinson) was ultimately discharged. (RX-15, pp. R01729 - R01733; RX-38.)

[13] The GC also contends, overall, that UPS managers "testified inconsistently" regarding the comparative importance and purpose of SPORH statistics versus over-allowed hours. (GC Answer, pp. 44-45.) This could not be further from the truth. (R. Brief, p. 7 at fn.12.) The Company's witnesses unanimously and emphatically testified that over-allowed hours are much more useful than SPORH statistics for initially identifying efficiency problems and determining the labor costs associated with poor production. (Tr. 731-34, 1117-18; RX-24.) These same witnesses explained that, once an efficiency problem is initially identified and a plan undertaken to fix it, the Company must judge drivers by SPORH statistics (not by over-allowed hours) in order for production-related discipline to be acceptable to the Union. (Tr. 475-76, 731-34, 738-39, 941-42, 1522-25, 1682-84.)

that the GC's position suffers from the same fatal flaw as the ALJ's Decision. Namely, it fails to acknowledge the binding and preclusive effect of the Regional Director's unrevoked decision to defer to the November 2014 West Pennsylvania Area ("WPA") Grievance Panel ("Panel"). (RX-54.) Proper analysis of this case begins with acceptance of the Panel's ruling that Atkinson's May 19th suspension, June 18th suspension, and June 19th discharge were not based on "any protected activity." (GC-14(a-b); GC-15(a-b); GC-16(a-b).) These adverse actions—whether in original or reduced form—have thus been validated as legitimate business decisions rather than "retaliatory or discriminatory behavior by the Company."[14] (GC-14(a-b); GC-15(a-b); GC-16(a-b).) The Regional Director deferred to the Panel on March 30, 2015, under *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). (Tr. 1565-66; RX-26.) The Regional Director's deferral decision was thereafter reviewed and upheld by the Office of Appeals in December 2015. (RX-54, p. 1.)

Because the November 2014 Panel found Atkinson's June 19th sustainability discharge to be nondiscriminatory, logic dictates that the underlying June 18th blended ride must be equally lawful.[15] This blended ride led not only to Atkinson's June 19th discharge for sustainability, but also to his June 20th discharge for violating the 340 Methods on which he was trained during his OJS ride. It is undisputed that—whether considered in original or reduced form—the Panel-approved discipline in May and June 2014 placed Atkinson squarely at the discharge step of the progressive discipline process by June 20th.[16] It is also undisputed that Atkinson actually committed methods infractions on his June 18th blended ride. (Tr. 701, 800, 819, 1006, 1009, 1206-07, 1381-83, 1551-53, 1560-61, 1656, 1696-; RX-27, pp. 10-12.)

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[14] The November 2014 Panel found that the May 19th three-day suspension, June 18th ten-day suspension, and June 19th discharge were legitimate and nondiscriminatory, and merely reduced and consolidated all the discipline into a 48-day suspension and "final warning," a decision to which the Board deferred. (ALJ, p. 40; Tr. 943; GC-14(a-b); GC-15(a-b); GC-16(a-b); RX-54, p. 1.) Further beyond dispute is the lawfulness of Atkinson's January 22nd warning letter and April 1st and May 22nd talk-withs, all of which occurred prior to the incidents considered by the Panel. Like Atkinson, several other drivers also received warning letters for missed NDA packages, and Atkinson neither grieved his warning nor believed it discriminatory. (ALJ, p. 10; Tr. 248, 321-22, 877-78; RX-7.) Atkinson also did not grieve his April 1st or May 22nd documented talk-withs, as they were commonplace, were not part of the contractual discipline process, and did not further his disciplinary progression. (Tr. 249-50, 431.)

[15] If the June 18th blended ride was unlawful, then its illegality would also taint the post-OJS sustainability analysis that led to Atkinson's June 19th discharge—which would mean the Panel's decision to uphold that discharge would be "repugnant to the purposes and policies of the [NLRA]" under *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). However, both the Regional Director and the Office of Appeals found all *Spielberg* factors to be met and thus deferred to the November 2014 Panel decision. (RX-54.)

[16] The General Counsel suggests that, although the June 19th discharge was ultimately reduced by the November 2014 Panel, the reduction did not occur "before the discharge was used as a basis for the issuance of more serious discipline." (GC Answer, p. 31 fn.70.) However, any delay in the reduction of Atkinson's June 19th discharge had no practical effect on his disciplinary progression. If the original June 19th discharge had never been reduced, it obviously would have left Atkinson at the discharge step, and the Panel's subsequent reduction of the June 19th discharge leads to the same result. That is, whether Atkinson's record reflected a discharge versus a 45-day suspension and "final warning" for the sustainability infraction, Atkinson nevertheless would be facing discharge for his subsequent methods infractions on June 20th and October 28th.

Quite simply, the GC—like the ALJ—refuses to accept that the Regional Director's deferral decision is binding and preclusive in Board proceedings involving related facts. *See Mt. Sinai Hosp.*, 331 NLRB 895, 913 fn.3 (2000) (rejecting theory that arbitrator's decision was "law of the case" because, "[i]n the absence of deferral, the arbitrator's decision is not binding on the Board") (emphasis added); *J.R. Simplot Co.*, 311 NLRB 572, 590 fn.9 (1993) (holding that "'law of the case' notions cannot operate to 'bind' the Board to a prior arbitral result," but specifically noting that "[v]oluntary 'deferral' by the Board in the limited way envisioned in *Spielberg* is a separate question") (emphasis added); *Postal Serv.*, 288 NLRB 500, 501 (1988) ("Complying arbitral awards under [the Board's deferral] policy are given binding weight, and relitigation of the underlying unfair labor practice allegations is barred.") (emphasis added). The Board cannot simply ignore findings from grievance awards to which it has already deferred when those same findings are relevant to remaining Board charges. *See The Liberal Mkt., Inc.*, 264 NLRB 807, 817 (1982) ("the fact that 'differing inferences' might be drawn by the Board does not justify intervention by the latter where that drawn by the arbitrator relates reasonably to the facts before him"); *see also Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 858–59 (2006) (ALJ erred by relying on informal settlement as "background evidence of the Respondent's anti-union animus," where settlement alleged violations on which ALJ relied to find animus).

It would make a mockery of national labor policy for the Board to issue decisions inconsistent with related contractual grievance awards to which it previously deferred. When the full import of the November 2014 Panel decision is properly considered in conjunction with the record evidence, it is clear UPS would have discharged Atkinson on June 20th and on October 28th regardless of any NLRA-protected activity.[17]

B. The General Counsel not only failed to make an initial showing of animus, but also failed to rebut the Company's compelling affirmative defense by proving pretext.

The GC's unsupported arguments—like the ALJ's conclusory assumptions—are insufficient to establish animus toward Atkinson in particular. The GC claims UPS "was well aware that Atkinson spearheaded the 'Vote No' activities at New Kensington, even referring to him as a 'sphere of influence' at the Center." (GC Answer,

[17] Even if the June 20th discharge was ignored or treated as though it had never occurred, Atkinson's remaining disciplinary record would still reflect his June 19th discharge (or 45-day suspension and "final warning") for the sustainability infraction, so Atkinson would still be facing the progressive disciplinary step of discharge for his next methods failure in October 2014. The GC suggests that Atkinson's October 28th discharge reflects suspicious timing because it occurred after he lost the Union election, when UPS "no longer needed to keep [him] employed." (GC Answer, p. 46.) This argument is puzzling, as UPS never "needed to keep Atkinson employed." Atkinson remained employed until the January 2015 Panel upheld his October 2014 discharge, which was simply the next step in the progressive discipline process after his prior suspensions and discharges in May and June 2014.

p. 12 at fn.22.) It is undisputed that UPS knew Atkinson engaged in many of the same activities as other Unit employees. (Tr. 807, 819-20, 856, 860, 875-76, 1008-09, 1206-08, 1379-83, 1551-52, 1564-65, 1632, 1656-57; RX-55.) However, there is no evidence UPS believed Atkinson personally "started" or "led" the "Vote No" Campaign; served as a "ringleader" on social media; "establish[ed]" a "Vote No" or Local 538 webpage; "post[ed] and/or distribut[ed]" literature; "creat[ed]" signs for other employees' windshields;[18] or "urg[ed]" employees to hang his signs (which conflicts with Atkinson's own testimony that "[o]ther drivers approached [him]" asking for signs). (ALJ, pp. 7, 9-10, 34, 40, 52-53; Tr. 156, 316 (Emphasis added).) The GC cannot meet its burden simply by assuming UPS knew the full extent of Atkinson's alleged founding, origination, and participation in the "Vote No" Campaign.[19] *See, e.g., Iku-Usa, Inc.*, E 7-CA-37577, 1996 WL 33321434 (July 31, 1996) (dismissing 8(a)(3) claim for "lack of evidence Respondent was specifically aware of the union activities of all specific B-Team employees" and because "evidence that the B-Team actually was more active than other teams, and was known to be so, [was] tenuous").

UPS had "no idea" whether Atkinson personally created webpages or car signs, posted or distributed literature, or garnered hatred from Local 538 Business Agent Betty Fischer ("Fischer"). (Tr. 861, 865, 1207, 1216-17, 1222, 1382-84, 1552-53, 1557, 1657.) In fact, UPS believed Kerr was the "ringleader" whom Fischer "c[ould]n't stand." (Tr. 797, 857; RX-1, pp. 01871-01872; CP-1.) These facts beg the question: In the face of a multi-state "Vote No" Campaign, what makes Atkinson so special? Neither the ALJ's circular reasoning nor the GC's conclusory arguments provide an answer. The truth is, other WPA employees engaged in just as much—or more—activity as Atkinson. (R. Brief, pp. 19-21.) These comparators dealt with the same Labor Department and/or Center Team during the same period, yet they remained gainfully employed with little or no

[18] The GC disingenuously claims "McCready acknowledged that it was Atkinson who was putting the signs in the cars." (GC Answer, p. 16.) However, it is abundantly clear—from the plurality of both McCready's alleged statements and Atkinson's alleged responses—that any such discussion was about drivers' collective actions in putting signs in their car windshields. (Tr. 209.) There is no testimony to suggest that McCready attributed all the car signs to Atkinson alone. (Tr. 209.)

[19] Atkinson obviously fancies himself a "martyr" and wants to believe that everything somehow revolves around or relates back to him. In this vein, some of the General Counsel's witnesses testified that Atkinson personally created "Vote No" webpages and car signs, maintained the Local 538 webpage, and posted "Vote No" literature. (Tr. 151-53, 156, 190, 199, 297-300, 315-17, 395, 399-400, 485, 488, 496-98, 568.) But that testimony falls far from establishing that UPS knew Atkinson had such a high level of personal responsibility for originating "Vote No" propaganda. Indeed, there is no evidence UPS ever saw or heard of Atkinson personally creating or displaying such materials, and there is affirmative evidence that UPS either did not know who was responsible for various "Vote No" propaganda or attributed it to other employees. (Tr. 154, 316-17, 341, 445-47, 450, 498-99, 530, 1216-17.) Without proof that UPS viewed Atkinson was the "ringleader" ultimately responsible for the "Vote No" activity in WPA, there is no evidence to suggest that the Company singled him out from countless other "Vote No" activists.

discipline.[20] (R. Brief, pp. 19-21.) UPS simply saw nothing "special" about Atkinson that would motivate the Company to treat him worse than countless other "Vote No" activists who suffered no adverse action.[21] *See, e.g., Nichols Aluminum, LLC v. NLRB,* 797 F.3d 548, 554-55 (8th Cir. 2015) (denying enforcement in 8(a)(3) case because "[s]imple animus toward the union is not enough . . . . [to] supply the element of unlawful motive [toward a particular employee]").

The GC seeks to distinguish the Company's comparator evidence, despite neglecting to do so at trial. (GC Answer, pp. 14, 45.) The GC attacks the Company's "boilerplate" discipline letters, insisting they are not "valid comparisons" because they fail to detail specific infractions. This "boilerplate" discipline language does not undercut the comparator evidence, however, as McCready's unrebutted testimony establishes the comparators were similarly-situated.[22] Unless the GC introduces its own evidence showing significant disparate treatment, or specifically distinguishes the proffered comparators identified by UPS, the Company's unrebutted evidence must be accepted. *Avondale Indus., Inc.*, 329 NLRB 1064, 1066 (1999) (recognizing that, "in the absence of countervailing evidence . . . the Respondent can meet its *Wright Line* burden by demonstrating that it has a rule [that] has been applied to employees in the past," and rejecting employer's comparator evidence only because GC proved "significant disparate treatment"). Here, the GC failed to elicit testimony to distinguish the Company's comparators, and the GC's case cannot be established through assumptions of evidence it failed to elicit. *Holo-Krome Co. v. N.L.R.B.*, 954 F.2d 108, 113 (2d Cir. 1992).

That some of the comparators may not have violated the very same methods as Atkinson—there are 340 different methods, after all—does not suggest the comparator evidence should be discredited. *See Merillat Indus., Inc.*, 307 NLRB 1301, 1303 (1992) (employer proved it would have fired employee even absent union

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[20] The closest comparators are Kerr, Larimer, and Gary Piso ("Piso"). For example, UPS knew that—like Atkinson—Kerr, Larimer, and Piso were all very active in the "Vote No" Campaign and were all either running for, or already holding, an elected position with their local union. (R. Brief, pp. 19-21.) And UPS was aware that—like Atkinson—Kerr and Piso had served as union stewards, filed unfair labor practice charges, and encouraged a Unit slowdown or walkout. (R. Brief, pp. 19-21.) But UPS also knew that Kerr and Piso engaged in other concerted activities that Atkinson never did, such as circulating consent decree petitions and "Vote No" petitions at UPS facilities, taking "sarcastic" photos sitting in Hoffa's chair and posting them on the TDU website, and providing interviews to the Pittsburgh Tribune Review about the "Vote No" Campaign. (R. Brief, pp. 19-21.)

[21] The Company's lack of animus is further evident from the fact that UPS twice tried to resolve the grievances related to his June 19th and 20th discharges and his May 19th and June 18th suspensions. (Tr. 1668, 1672-74.) The first offer was to reduce everything to a 30-day suspension and last chance agreement—the same offer accepted by Clark. (ALJ, pp. 15-16 at fn.23; Tr. 1686.) Atkinson balked at this offer, so UPS instead agreed to reduce everything to a 15-day suspension without a last chance agreement. (Tr. 1667-74, 1686-88.) If UPS wanted to "get rid" of Atkinson, the Company would not have offered to reinstate him—particularly on terms more favorable than offered to employees who did not serve as union stewards, participate in the "Vote No" Campaign, or run for union office.

[22] As an international employer tasked with monitoring the performance and behavior of over 200,000 bargaining unit members, it is no wonder that UPS has standardized and streamlined its discipline process and documentation to be consistent across the nation.

activity by showing just one earlier discharge for similar misconduct, as "it is rare to find cases of previous discipline that are 'on all fours' with the case in question" and employer should not be prejudiced due to lack of "identical" comparators); *Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB 347, 355, n.15 (2006) (for *Wright Line* defense, employers need not show identical past situations where identical discipline was imposed). Indeed, even if no one was disciplined for exactly the same reason or in exactly the same manner as Atkinson, "discipline is not necessarily unlawful solely because an employer has imposed it for the first time." *St. George Warehouse, Inc.*, 349 NLRB 870, 879. In short, without presenting evidence of disparate treatment, or discrediting the Company's comparator evidence by eliciting specific facts to distinguish it, the GC cannot prove that the Company's reason for terminating Atkinson was pretext. *See Avondale*, 329 NLRB at 1066 ("Respondent must only prove its defense by a preponderance of the evidence. The defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.") (internal quotations and citations omitted).

Quite simply, the GC did not meet its burden of proving that UPS discriminated against Atkinson. UPS treated Atkinson the same as countless other employees who were disciplined and discharged for methods infractions, as reflected by the comparator evidence the GC failed to rebut.[23] The Board recognizes that "an employer's testimony will probably not be particularly precise in distinguishing between the reason for the adverse action actually taken and the reason that would have motivated the adverse action in the absence of protected activity." *Holo-Krome*, 954 F.2d 108, 113–14. That an employer's explanation "might not be sufficient to preclude a finding that the *prima facie* case remains does not inevitably mean that the affirmative defense will fail." *Id.* at 114. Even where an ALJ concludes that NLRA-protected activity played some part in the employer's motivation, the employer's explanation may carry "sufficient credibility to support a finding that the employer would have acted on the valid reason in the absence of protected activity." *Id.* Here, the record is clear that even if UPS disliked Atkinson's protected concerted activities, his repeated methods were the but-for cause of his discharge.[24]

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[23] The Board need not defer to the ALJ's finding of discrimination, as it is based not on credibility determinations (to which the Board defers) but on inferences and interpretations of record facts (which do not bind the Board). *See Hosp. Cristo Redentor, Inc.*, 347 NLRB 722, 729 (2006).

[24] UPS is not required to prove its decision-makers were completely free from anti-union animus. The Company need only prove that, despite any animus, the same decision would have been made regardless of Atkinson's concerted activity. It is well-settled that employers can still prevail on their affirmative

C. The January 2015 Panel was fair and regular and not tainted by conflict of interest.

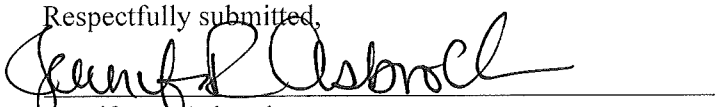
Contrary to the GC's arguments, deferral to the January 2015 Panel is not "inappropriate" due to any bias. (GC Answer, p. 48.) There is no evidence whatsoever that the Panel was biased. The fact that Fischer was Atkinson's political rival does not demonstrate a conflict of interest. *See Asset Protection & Security Services*, 362 NLRB No. 72 (Apr. 22, 2015) (fact that discriminatee and union representative were on opposite tickets in campaign for union presidency "might have been awkward, it is insufficient to warrant a finding of hostility, conflict of interest, or adverse interest"). Moreover, any accusations against Company and Union Panel members stand in stark contrast to *Mercy Hospital & Serv. Employees Int'l Union*, 18-CA-155443, 2016 WL 2621337 (May 6, 2016), where the judge found the grievance procedure appropriate despite evidence that the employer threatened the grievant, threatened a union steward, and advised managers that the grievant was not a team player, among other things. While one or both Panel members may have asked questions about the "Vote No" campaign, or read or forwarded articles and social media postings about the "Vote No" campaign, does not prove they could not be fair and impartial on the Panel.

IV. CONCLUSION

For the reasons stated above, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed.

Dated: March 10, 2017

Respectfully submitted,



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defense despite that specific supervisors known to harbor anti-union animus were responsible for the allegedly discriminatory employment decisions. *See, e.g., Gallup, Inc.*, 349 NLRB 1213, 1278 (2007); *Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 862 (2006); Iku-Usa, Inc., E 7-CA-37577, 1996 WL 33321434 (July 31, 1996); *Merillat Indus., Inc.*, 307 NLRB 1301, 1305, 1307-08 (1992).

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.org) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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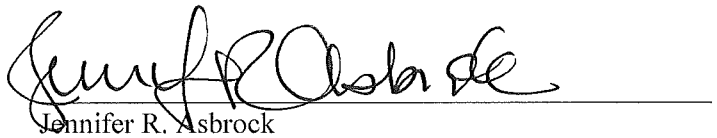

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